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6 Attorneys for Defendant MIDLAND  
FUNDING, LLC  
7

8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10  
11 CHARLIE HAUSWIRTH,

Case No. 12-CV-0711 DMS (DHB)

12 Plaintiff,

**JOINT MOTION FOR  
DETERMINATION OF  
DISCOVERY DISPUTE**

13 v.

14 MIDLAND FUNDING, LLC; LEGAL  
15 RECOVERY LAW OFFICES, INC.;  
and MARK D. WALSH,

16 Defendants.

17  
18 **I. Introduction**

19 The issue before the Court is whether Plaintiff Charlie Hauswirth (“Plaintiff”)  
20 must provide to Midland Funding LLC (“Midland” or “Defendant”) information  
21 regarding his banking records in response to Midland’s interrogatories.

22 **II. Midland’s Position**

23 In this Fair Debt Collection Practices Act (“FDCPA”) case, Plaintiff claims  
24 that Midland violated the FDCPA when it alleged an account stated cause of action  
25 against Plaintiff in a state court debt collection action. Plaintiff’s theory is that he  
26 never agreed to a final statement of the account and never agreed to a new contract  
27 to replace the original credit card agreement, and that Midland’s state court  
28 complaint was therefore misleading and violated the FDCPA.

1        As part of its defense, Midland is seeking to establish that (1) Plaintiff  
2 obtained and used the credit account at issue in the case, (2) that Plaintiff received  
3 billing statements on the account, and (3) that Plaintiff never objected to those  
4 billing statements—which California courts have held is sufficient support an  
5 account stated. *See, e.g., Zinn v. Fred R. Bright Co.*, 271 Cal. App. 3d 597, 600  
6 (1969) (“in the usual situation, [an account stated] comes about by the creditor  
7 rendering a statement of the account to the debtor. If the debtor fails to object to the  
8 statement within a reasonable time, the law implies his agreement that the account is  
9 correct as rendered.”).

10      To establish the first two points, Midland served discovery on Plaintiff  
11 requesting, among other things, (1) that Plaintiff admit he owned the credit account  
12 at issue and used it to purchase goods or services (Request for Admission (“RFA”)  
13 Nos. 1 & 2, attached as **Exhibit 1**<sup>1</sup>); (2) that Plaintiff admit he received billing  
14 statements on the account (RFA No. 5); (3) that Plaintiff state whether he obtained  
15 the credit card account at issue (Interrogatory (“Rog”) No. 2, attached as **Exhibit 2**);  
16 (4) that Plaintiff state whether he used the credit card to purchase goods or services  
17 (Rog No. 3); (5) that Plaintiff state whether he received billing statements for the  
18 credit card at issue (Rog No. 5); and (6) that Plaintiff identify the financial accounts  
19 he maintained during a specified time period, or from which he made any payment  
20 toward any balance due for the credit card at issue (Rog Nos. 8 & 9).

21      In response, Plaintiff (1) denied he had owned or used the account at issue  
22 (RFA Nos. 1 & 2); (2) denied received any billing statements on the account (RFA  
23 No. 5); (3) claimed he could not say “whether or not he received a credit card with  
24

25      <sup>1</sup> Because Plaintiff reproduced Midland’s requests in his responses, in the interests  
26 of brevity and for the Court’s convenience Midland attaches only Plaintiff’s  
27 responses. Plaintiff’s Responses to Midland’s Requests for Admissions are attached  
28 as **Exhibit 1**; Plaintiff’s Responses to Midland’s Interrogatories are attached as  
**Exhibit 2**.

1 that exact account number" (Rog No. 2); (4) again claimed he could not say  
2 "whether or not he received a credit card with that exact account number" (Rog No.  
3 3); (5) claimed he could not "say whether he received billing statements for the  
4 credit card account" at issue (Rog No. 5); and (6) objected to identifying his  
5 financial accounts because the request was "not reasonably calculated to lead to  
6 discoverable information" and on grounds of privacy (Rog Nos. 8 & 9).

7 Because Midland has possession of billing records accurately reflecting  
8 Plaintiff's name and address (attached as **Exhibit 3**), Midland believes that  
9 Plaintiff's answers were less than complete. As such, the parties met and conferred  
10 on this issue, as well as the identification of the financial accounts, via letter,  
11 telephone, and in person.

12 In response to the parties' meet and confer efforts, Plaintiff's counsel sent a  
13 letter, which is attached as **Exhibit 4**. As relevant to this motion, he stated that:

14 [H]e recalls at one time having an account with Chase. He does not  
15 recall the agreement attached as being his. He does not have a specific  
16 recollection of making payments in the amount listed, but had a prior  
17 history of making minimum monthly payments on similar accounts.  
Further, he would make any payments on his accounts, Chase included,  
with a money order, so any banking records would not evidence  
payment on the account.

18 (Exhibit 3.) Plaintiff has not agreed to provide the financial account information.

19 **Plaintiff's Financial Account Information Is Discoverable**

20 Plaintiff objected to identifying his financial account on the grounds of  
21 relevancy and privacy. Both claims fail.

22 As this Court knows, a party is entitled to discover any nonprivileged matter  
23 relevant to any party's claim or defense. Fed. R. Civ. Proc. 26(b). Particularly in  
24 these circumstances, Plaintiff's banking information is directly relevant to Plaintiff's  
25 claims and Midland's defenses. If Plaintiff claims he cannot remember whether he  
26 owned this account or received account statements, Midland requires another  
27 avenue for establishing his ownership of the account. Plaintiff claims he would  
28 have made payments with a money order, but Midland is not obligated to take

1 Plaintiff's word on this, particularly in light of his averred lack of memory on other  
2 issues. Additionally, even if this were true, if there are money order transactions on  
3 the account or withdrawals in the approximate amount of his payments reflected in  
4 the billing statements, such information would tend to prove that Plaintiff was  
5 making payments on the account, and therefore in fact owned the account, received  
6 billing statements, and did not object to them—issues directly relevant to the claims  
7 and defenses in this case. Midland has attempted to obtain this information through  
8 less intrusive means, but Plaintiff's claimed memory failure has made that attempt  
9 futile. Plaintiff claims that these issues can be established through the Original  
10 Creditor's billing records—but Midland already has those records, which show that  
11 someone with Plaintiff's name and Plaintiff's address owned, used, and made  
12 payments on the account. Plaintiff refuses to admit this in discovery, so Midland  
13 needs access to Plaintiff's bank records to show that Plaintiff made payments on the  
14 account, which tends to prove all of the above.

15 Plaintiff's privacy claim fails as well. Plaintiff has the burden to prove that  
16 this information is privileged. *See, e.g., Kelly v. City of San Jose*, 114 F.R.D. 653,  
17 662 (N.D. Cal. 1987) ("because privileges operate in derogation of the truth finding  
18 process the law places the burden of proving all the elements essential to invoking  
19 any privilege on the party seeking its benefits"). He cannot.

20 Federal Rule of Evidence ("FRE") 1101 provides that the rule of evidentiary  
21 privilege of the FRE applies to all stages of proceedings before United States district  
22 courts. Fed.R.Evid. 1101(a) & (c). Under the FRE, "evidentiary privileges in  
23 federal question cases are governed by federal common law." *Dole v. Milonas*, 889  
24 F.2d 885, 889 n. 6 (9th Cir.1989) (*citing United States v. Zolin*, 491 U.S. 554, 109  
25 S.Ct. 2619, 105 L.Ed.2d 469 (1989); *see also United States v. Hodge and Zweig*,  
26 548 F.2d 1347, 1352–53 (9th Cir.1977)). Federal courts do not recognize a right to  
27 privacy in banking records. *In re Yassai*, 225 B.R. 478, 483 (Bankr. C.D. Cal. 1998)  
28 ("assuming that a state constitution creates 'a right to privacy in financial records,

1 such state privilege[ ] do[es] not preclude discovery' of bank records 'in a federal  
2 court suit.'").

3 Even if there were a recognizable federal privacy interest in banking records,  
4 under the federal balancing test applicable to privilege claims, Midland is entitled to  
5 discover the information. Resolution of a privacy objection requires a balancing of  
6 the need for the information sought against the privacy right asserted. *Perry v. State*  
7 *Farm Fire & Cas. Co.*, 734 F.2d 1441, 1447 (11th Cir.1984), *cert. den.* 469 U.S.  
8 1108, 105 S.Ct. 784, 83 L.Ed.2d 778 (1985) (requests for court orders for release of  
9 information from government agencies should be evaluated by balancing need for  
10 disclosure against potential harm to the subject of the disclosure). A carefully  
11 drafted protective order minimizes the impact of disclosure and weighs in favor of  
12 discovery—even where the privilege at stake is much more compelling than that  
13 here. *See Kelly v. City of San Jose*, 114 F.R.D. 653, 662, 666 (N.D. Cal. 1987)  
14 (discussing discovery of police procedures and other internal police department  
15 documents).

16 As discussed above, Midland attempted to obtain this information through  
17 less intrusive means, but Plaintiff's claimed ignorance has made that attempt futile.  
18 And as this Court knows, a protective order already exists in this case, which  
19 Plaintiff is free to invoke and which minimizes any potential harm to Plaintiff.  
20 Plaintiff's privacy right—if it even exists in this case—is outweighed by Midland's  
21 legitimate need for this information, especially in light of Plaintiff's professed  
22 inability to recall receiving the billing statements sent to Plaintiff at his admitted  
23 address.

24 **III. Plaintiff's Position**

25 Defendant misunderstands Plaintiff's legal theory and what is at issue in this  
26 case. As Defendant states, Plaintiff alleges that Defendants violated the FDCPA  
27 when they stated a cause of action against Plaintiff in state court collection action  
28 for an "account stated". However, despite identifying the issue, Defendant fails to

1 comprehend the underlying argument raised by Plaintiff, i.e. that it was false to  
2 allege Account Stated in the state court collection action because the required  
3 elements of an account stated were not present.

4 An account stated is a contract which replaces another contract *Mercantile*  
5 *Trust Co. v. Doe*, 26 Cal. App. 246, 252 (Cal. App. 1914), *Zinn v. Fred R. Bright*  
6 *Co.*, 271 Cal. App. 2d 597, 602 (Cal. App. 4th Dist. 1969). An account stated  
7 requires an offer, acceptance, and consideration. Consideration, in the context of  
8 account stated, is formed by a compromise between the parties as to the outstanding  
9 account balance due from the debtor to the creditor. *Gardner v. Watson* 170 Cal  
10 570, 574 (1915). Furthermore, an account stated can only be formed between two  
11 parties with a prior relationship, in this case the original creditor and the debtor.  
12 *Trafton v. Youngblood*, 69 Cal. 2d 17, 26 (Cal. 1968), *Gleason v. Klamer*, 103 Cal.  
13 App. 3d 782, 786-787 (Cal. App. 2d Dist. 1980).

14 Here, Defendant contends that Plaintiff and the original creditor formed an  
15 account stated when the original creditor rendered a final billing statement to  
16 Plaintiff, which Plaintiff received and did not dispute. While Plaintiff acknowledges  
17 that a final billing statement could be the writing which creates an account stated  
18 between a consumer and his creditor, in certain, narrow circumstances, Plaintiff  
19 does not allege such facts arose in this case.

20 An account stated requires intent of the offering party (the original creditor)  
21 to enter into an account stated and thereby waive previous contracts and all terms  
22 contained in such preceding contracts. *Coffee v. Williams*, 103 Cal. 550, 556 (Cal.  
23 1894). A billing statement could contain the terms of an account stated between the  
24 parties, however any writing confirming the creation of an account stated must  
25 possess an element of finality. *American Fruit Growers, Inc. v. Jackson*, 203 Cal.  
26 748, 751 (Cal. 1928).

27 For the most part, billing statements have nothing to do with an account  
28 stated. At best, one billing statement, specifically a final billing statement

1 (commonly referred to as a “charge off statement” in the industry vernacular), might  
2 be relevant to establishing an account stated, but even then, this billing statement  
3 would only be relevant if it demonstrated, on its face, with clearness and certainty  
4 that it was intended by the parties to document a a final settlement up to date, and  
5 both parties assented to form an account stated.

6 It is doubtful if the foregoing would, under any view, constitute an  
7 independent cause of action as an account stated. An account stated is  
8 a document – a writing – which exhibits the state of account between  
9 parties and the balance owing from one to the other; and when assented  
10 to, either expressly or impliedly, it becomes a new contract. An action  
11 upon it is not founded upon the original items, but upon the balance  
agreed to by the parties. ... **But the account, in order to constitute a  
contract, should appear to be something more than a mere  
memorandum; it should show upon its face that it was intended to  
be a final settlement up to date. And this should be expressed with  
clearness and certainty.**

12 *Coffee v. Williams*, 103 Cal. 550, 556 (Cal. 1894) (Bold face added.)

13 This issue was recently addressed in the Southern District of California and  
14 Judge Hayes noted that, “In order to constitute an account stated, there must be an  
15 “element of finality” to the statement....” *Alaan v. Asset Acceptance LLC*, 2011  
16 U.S. Dist. LEXIS 88104, at 24. After *Coffee* was decided, Supreme Court of  
17 California again stated this holding:

18 There is in the case before us no element of finality, as the parties were  
19 still transacting business. These statements were sent periodically and  
business was continued between them as before. There is no ground  
20 whatever for the contention that the account was rendered and intended  
to be an account stated, or that said *Osborne*, either expressly or  
impliedly, considered that it was such.

21  
22 *American Fruit Growers, Inc. v. Jackson*, 203 Cal. 748, 751-752 (Cal. 1928).

23 The issue before the court is whether or not an account stated was formed.  
24 Since the parties disagree as to what exactly is required to form an account stated,  
25 the documents and discovery should be focused on that issue only.

26 This discovery dispute is based on Defendant requesting all of Plaintiff's  
27 personal financial records from which a payment may have been made on this  
28 alleged account. Defendant claims that it needs Plaintiff's highly confidential bank

1 records to “establish through Plaintiff’s financial records that Plaintiff made  
2 payments to the Original creditor,” and to then “match Plaintiff’s payment to  
3 payments reflecting in billing statements” which would “tend to prove the Plaintiff  
4 in fact owed the accounts, received billing statements, and did not object to them.”  
5 Defendant hopes to use this fishing expedition to discover information necessary to  
6 establish the formation of an account stated.

7 Whether Plaintiff had the account with the original creditor is almost  
8 irrelevant here, and whether payments were made to the original creditor doesn’t  
9 come anywhere near establishing an account stated. However, there is a better and  
10 less intrusive way to get the information. *Jackson v. Unisys, Inc.*, 2009 U.S. Dist.  
11 LEXIS 121716 (E.D. Pa. Dec. 31, 2009) (Information should be gleaned from less  
12 intrusive methods in an effort to protect a person’s privacy interest in his tax  
13 returns.) See also, *United States v. O. K. Tire & Rubber Co.*, 71 F.R.D. 465 (D.  
14 Idaho 1976)

15 With this in mind, the first question that should be asked is this- how does  
16 discovery of Plaintiff’s personal and confidential bank records establish an account  
17 stated? It is difficult to imagine how Plaintiff’s bank records could be used as a  
18 means to reach this end. Any information needed to establish Defendant’s  
19 “defense” can be obtained from the original creditor. The obvious, best, and least  
20 intrusive approach here is for Defendant to simply go to the original creditor and  
21 say, “You claim there was an account stated here based on a final billing statement,  
22 provide us with a copy of that final statement along with any payments made by Mr.  
23 Hauswirth on the account.” Not only would this be less intrusive than divulging  
24 Plaintiff’s personal and confidential bank records, it would allow the parties to  
25 examine the writing which Defendants claim exists, and for which Defendants rely  
26 on so heavily for their defense. Plaintiff has previously tried to schedule a deposition  
27 and request documents from the original creditor in this case, but Defendant has  
28 balked at every opportunity. Instead, Defendant insists that Plaintiff turn over all of

1 her private financial records. Plaintiff believes these records to be irrelevant and not  
2 leading to other admissible evidence. In light of this issue and being unable to  
3 resolve the dispute, Plaintiff is in the process of setting a deposition and production  
4 of documents from the original creditor in late March of 2013.

5 In *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 145 F.R.D. 92 (S.D. Iowa  
6 1992), the court held that before a defendant would be permitted to depose  
7 plaintiff's president, it would be required to first depose other employees whom  
8 plaintiff asserted had more personal knowledge of underlying facts of dispute. That  
9 is similar to the issue at hand. Defendant should not be allowed to engage in such  
10 an expansive fishing expedition into Plaintiff's personal financial records when  
11 there are less intrusive and more efficient means to gather the information  
12 Defendant seeks.

13 By going directly to the original creditor and inquiring as to whether the  
14 original creditor rendered such a final billing statement to the plaintiff and whether  
15 the original creditor actually intended any statement rendered to constitute account  
16 stated, the issue here will be narrowed (if not eliminated) to the point where any  
17 examination of Plaintiff's billing records will be restricted to a very narrow window  
18 of time.

19 Merely claiming that the original creditor *might have* sent out "billing  
20 statements," and one of these billing statements *might have* contained an "element  
21 of finality," which in turn the original creditor *might have* relied upon to form  
22 account stated which Plaintiff *might have* paid, does not establish cause to intrude  
23 upon Plaintiff's highly confidential bank records. Defendant could, *instead*, merely  
24 subpoena from the original creditor the one final billing statement Defendant hopes  
25 to rely upon.

26 Further, one, and only one, billing statement could possibly be relevant; the  
27 one that contained an "element of finality." *Alaan v. Asset Acceptance LLC*, 2011  
28 U.S. Dist. LEXIS 88104. And even that one billing statement is irrelevant unless it

1 “show[s] upon its face that it was intended to be a final settlement up to date ... with  
2 clearness and certainty.” *Coffee v. Williams*, 103 Cal. 550, 556 (Cal. 1894).  
3 Defendant cannot use the mere possibility that such a billing statement may exist to  
4 justify its desired fishing expedition.

5 If the defendant is suggesting that one of these billing statements was the  
6 “final” billing statement, which contained an “element of finality” to it, Defendant  
7 should produce that billing statement so that it can first be examined to determine  
8 whether such statement contained an element of finality. Presumably Defendant has  
9 the billing statement that it claims created this account stated; it did, after all, sue  
10 Plaintiff based on that theory in state court. Once produced, the court can determine  
11 whether the final billing statement contains an element of finality, and if so, which  
12 bank records are needed to resolve this issue and narrow any intrusion into  
13 Plaintiff’s financial records.

14 **IV. Declaration of Compliance with Meet and Confer Requirements Under**  
15 **Civil Local Rule 26.1.a.**

16 Counsel for the parties met in person on Tuesday, January 22, 2013, to  
17 discuss the above outstanding discovery issues, and were unable to come to an  
18 agreement regarding production of Plaintiff’s bank records.

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1 DATED: February 15, 2013

Respectfully submitted,

2  
3 SOLOMON WARD SEIDENWURM &  
SMITH, LLP

5 By: *s/Thomas F. Landers*

6 THOMAS F. LANDERS  
7 LEAH S. STRICKLAND  
8 Attorneys for Defendant MIDLAND  
FUNDING, LLC

9 DATED: February 15, 2013

HYDE & SWIGART

11 By: *s/Joshua B. Swigart*

12 JOSHUA B. SWIGART  
13 ROBERT L. HYDE  
14 Attorneys for Plaintiff CHARLIE  
15 HAUSWIRTH

16 **Signature Certification**

17 Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative  
18 Policies and Procedures Manual, I hereby certify that the content of this document is  
19 acceptable to Joshua B. Swigart, counsel for plaintiff, and that I have obtained Mr.  
20 Swigart's authorization to affix his electronic signature to this document.

22 *s/ Thomas F. Landers*  
23 THOMAS F. LANDERS

# **EXHIBIT 1**

1 Joshua B. Swigart, Esq. (SBN: 225557)  
2 josh@westcoastlitigation.com  
3 Robert L. Hyde, Esq. (SBN: 227183)  
4 bob@westcoastlitigation.com  
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11 Attorneys for Plaintiff, Charlie Hauswirth  
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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Charlie Hauswirth  v.  Midland Funding, LLC, Legal Recovery Law Offices, Inc., and Mark D. Walsh  Defendant.	Case No: 12-CV-00711 DMS (DHB)  <b>PLAINTIFF CHARLIE HAUSWIRTH'S RESPONSES TO DEFENDANT MIDLAND FUNDING, LLC'S REQUESTS FOR ADMISSION, SET ONE</b>
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PROPOUNDING PARTY: DEFENDANT, MIDLAND FUNDING, LLC

RESPONDING PARTY: PLAINTIFF, CHARLIE HAUSWIRTH

SET NO.: ONE

**TO DEFENDANT MIDLAND FUNDING, LLC, AND ITS  
ATTORNEYS OF RECORD:**

COMES NOW Plaintiff, **CHARLIE HAUSWIRTH'S**, by and through counsel, hereby responds as follows to Defendant **MIDLAND FUNDING LLC'S** REQUESTS FOR ADMISSION to Plaintiff, heretofore filed in this case, without in any way waiving or intending to waive, but on the contrary intending to reserve and reserving:

1  
2 (a) All questions and objections as to competency, relevancy,  
3 materiality, privilege admissibility as evidence for any purpose in any  
4 subsequent proceeding in, or the hearing of this action, of any of these  
5 answers or the subject matter thereof;  
6 (b) The right to object to the use of any of said answers, or the subject  
7 matter thereof, in any subsequent proceeding, in or the hearing of this  
8 action, on any grounds;  
9 (c) The right to object on any grounds or at any time to demand for  
10 further response to these or other discovery documents or other  
11 discovery procedures involved or related to the subject matter of the  
12 requests for admissions herein answered; and  
13 (d) The right at any time, to revise, correct, add to or clarify any of  
14 said answers propounded herein.

15 **REQUESTS FOR ADMISSION**

16 **REQUEST FOR ADMISSION NO 1:**

17 Admit YOU had a credit card account bearing account no.  
18 4018040019787686. "YOU," "YOUR" or "HAUSWIRTH" mean CHARLIE  
19 HAUSWIRTH and his agents and any PERSON acting on his behalf.

20 The terms "PERSON" or "PERSONS" mean all individuals and entities of  
21 any form including a natural person, firm, association, organization, partnership,  
22 business, trust, corporation, joint venture, or public entity and their agents,  
23 employees, representatives and any other persons acting on their behalf.

24 **RESPONSE TO REQUEST FOR ADMISSION NO 1:**

25 Deny.

26 **REQUEST FOR ADMISSION NO 2:**

27 Admit YOU used the credit card account bearing account no.  
28 4018040019787686 to purchase goods or services.

29 **RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

1 Deny.  
2

**REQUEST FOR ADMISSION NO 3:**

3 Admit YOU incurred a balance on the credit card account bearing account  
4 no. 4018040019787686.

5 **RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

6 Deny.  
7

**REQUEST FOR ADMISSION NO 4:**

8 Admit that YOU failed to pay in full the balance due for the credit card  
9 account bearing the account no. 4018040019787686.

10 **RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

11 Deny.  
12

**REQUEST FOR ADMISSION NO 5:**

13 Admit YOU received billing statements for the credit card account bearing  
14 account no. 4018040019787686.

15 **RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

16 Deny.  
17

**REQUEST FOR ADMISSION NO 6:**

18 Admit that YOU never objected in writing to any billing statement YOU  
19 received for the credit card account bearing account no. 4018040019787686.

20 **RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

21 Admit.  
22

**REQUEST FOR ADMISSION NO 7:**

23 Admit YOU received the billing statement attached hereto as Exhibit 1.

**RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

24 Upon a reasonable inquiry, Plaintiff lacks sufficient information to admit or  
25 deny the matter stated in the request. Discovery and investigation are ongoing..

26 **REQUEST FOR ADMISSION NO 8:**

27 Admit YOU never objected in writing to the billing statement attached hereto  
28 as Exhibit 1.

1                   **RESPONSE TO REQUEST FOR ADMISSION NO. 8:**  
2

Deny.

3                   **REQUEST FOR ADMISSION NO 9:**  
4

Admit YOU never objected orally to the billing statement attached hereto as  
5 Exhibit 1.

6                   **RESPONSE TO REQUEST FOR ADMISSION NO. 9:**  
7

Upon a reasonable inquiry, Plaintiff lacks sufficient information to admit or  
8 deny the matter stated in the request. Discovery and investigation are ongoing.

9                   **REQUEST FOR ADMISSION NO 10:**  
10

Admit YOU failed to pay the balance due shown on the billing statement  
11 attached hereto as Exhibit 1.

12                   **RESPONSE TO REQUEST FOR ADMISSION NO. 10:**  
13

Deny.

17                   Dated: November 15, 2012

Hyde & Swigart

18                   By:

19                   Joshua B. Swigart  
20                   Attorneys for Plaintiff

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Charlie Hauswirth

v.

Midland Funding, LLC, Legal Recovery  
Law Offices, Inc., and Mark D. Walsh

**Court Name:** UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF CALIFORNIA

**Case No.:** 12-CV-0711-DMS-DHB

**VERIFICATION**

I am the Plaintiff in the above-captioned matter. I am familiar with the contents of the foregoing:

**• PLAINTIFF CHARLIE HAUSWIRTH'S RESPONSES TO  
DEFENDANT MIDLAND FUNDING, LLC'S REQUESTS FOR  
ADMISSIONS, SET ONE**

The information supplied therein is based on my own personal knowledge and/or has been supplied by my attorneys or other agents and is therefore provided as required by law. The information contained in the foregoing document is true, except as to the matters, which were provided by my attorneys or other agents, and as to those matters, I am informed and believe that they are true.

I declare, under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 10-23-12, at San Diego, CA.  
(Date) (City, State)

Charlie Hauswirth

# EXHIBIT 2

1 Joshua B. Swigart, Esq. (SBN: 225557)  
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3 Robert L. Hyde, Esq. (SBN: 227183)  
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10  
11 Attorneys for Plaintiff, Charlie Hauswirth  
12

10  
11 **UNITED STATES DISTRICT COURT**  
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 Charlie Hauswirth 14 Plaintiff, 15 v. 16 Midland Funding, LLC, Legal 17 Recovery Law Offices, Inc., and 18 Mark D. Walsh 19 Defendants.	Case No: 12-CV-00711 DMS (DHB) 20 21 22 23 24 25 26 27 28
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20 PROPOUNDING PARTY: **DEFENDANT, MIDLAND FUNDING, LLC**  
21 RESPONDING PARTY: **PLAINTIFF, CHARLIE HAUSWIRTH**  
22 SET NO.: **ONE**

23 **TO DEFENDANT MIDLAND FUNDING, LLC, AND ITS  
ATTORNEYS OF RECORD:**

24 **COMES NOW** Plaintiff, **CHARLIE HAUSWIRTH'S**, by and through counsel,  
25 hereby responds as follows to Defendant **MIDLAND FUNDING LLC'S**  
26 **SPECIAL INTERROGATORIES** to Plaintiff, heretofore filed in this case, without  
27 in any way waiving or intending to waive, but on the contrary intending to reserve  
28 and reserving:

1  
2 (a) All questions and objections as to competency, relevancy,  
3 materiality, privilege admissibility as evidence for any purpose in any  
4 subsequent proceeding in, or the hearing of this action, of any of these  
5 answers or the subject matter thereof;  
6 (b) The right to object to the use of any of said answers, or the subject  
7 matter thereof, in any subsequent proceeding, in or the hearing of this  
8 action, on any grounds;  
9 (c) The right to object on any grounds or at any time to demand for  
10 further response to these or other discovery documents or other  
11 discovery procedures involved or related to the subject matter of the  
12 special interrogatories herein answered; and  
13 (d) The right at any time, to revise, correct, add to or clarify any of  
14 said answers propounded herein.

15 **INTERROGATORIES**

16 **INTERROGATORY NO. 1:**

17 State all residential addresses YOU maintained from January 1, 2002 to the  
18 present, including the dates YOU resided at each.

19 "YOU," "YOUR" or "HAUSWIRTH" mean CHARLIE HAUSWIRTH and  
20 her agents and any PERSON acting on her behalf.

21 The terms "PERSON" or "PERSONS" mean all individuals and entities of  
22 any form including a natural person, firm, association, organization, partnership,  
23 business, trust, corporation, joint venture, or public entity and their agents,  
24 employees, representatives and any other persons acting on their behalf.

25 **RESPONSE TO INTERROGATORY NO 1:**

26 7969 Golden Avenue, Lemon Grove, CA 91945.

27 **INTERROGATORY NO. 2:**

28 State whether YOU obtained a credit card account bearing account no.  
4018040019787686.

1

2

**RESPONSE TO INTERROGATORY NO. 2:**

3

4

5

Plaintiff cannot say whether or not he received a credit card with that exact account number. Discovery and investigation are continuing. Plaintiff reserves the right to supplement this response.

6

**INTERROGATORY NO. 3:**

7

8

State whether YOU used the credit card account bearing account no. 4018040019787686 to purchase goods or services.

9

**RESPONSE TO INTERROGATORY NO. 3:**

10

11

12

Plaintiff cannot say whether or not he received a credit card with that exact account number. Discovery and investigation are continuing. Plaintiff reserves the right to supplement this response.

13

**INTERROGATORY NO. 4:**

14

15

State whether YOU used the credit card account bearing account no. 4018040019787686 in connection with operating a business?

16

**RESPONSE TO INTERROGATORY NO. 4:**

17

18

No. Plaintiff did not use any credit card he is aware of in connection with operating a business.

19

**INTERROGATORY NO. 5:**

20

21

State whether YOU received billing statements for the credit card account bearing account no. 4018040019787686.

22

**RESPONSE TO INTERROGATORY NO. 5:**

23

24

25

Plaintiff cannot say whether he received billing statements for the credit card account bearing account no. 4018040019787686. Discovery and investigation are continuing. Plaintiff reserves the right to supplement this response.

26

**INTERROGATORY NO. 6:**

27

28

If YOU received billing statements for the credit card account bearing account no. 5176690012519711, IDENTIFY all instances in which YOU sent a written objection to the ORIGINAL CREDITOR RELATING to the balance shown

1 on the billing statement.

2 "IDENTIFY" when used with respect to a PERSON shall mean to provide  
3 the name, last known address and last known telephone number of the PERSON.  
4 When used with respect to a DOCUMENT, it shall mean to provide a description of  
5 the DOCUMENT (including date and title, where applicable) sufficiently specific  
6 to enable a request for production, together with the current location of the  
7 DOCUMENT. When used in reference to an event, means to give specific details  
8 for the event, including without limitation, dates, times, circumstances and  
9 PERSONS present or participating.

10 "DOCUMENT" or "DOCUMENTS" mean any and all other writings as  
11 defined in Federal Rule of Evidence 1001. It includes also any email and  
12 electronically stored information ["ESI," Fed.R.Civ.P. 34(a)(1)(A)], accessible or  
13 inaccessible, on magnetic or optical storage media, whether as active files,  
14 "deleted" files, backup files, file fragments, or slack.

15 "ORIGINAL CREDITOR" means and is defined herein as the party who  
16 initially offered credit to Plaintiff on the account that is the subject of the STATE  
17 COURT COMPLAINT.

18 STATE COURT COMPLAINT" means the matter entitled Midland Funding,  
19 LLC v. Charlie Hauswirth, Superior Court of California for the County of San  
20 Diego case number 37-2010-70826-CL-CL-EC.

21 **RESPONSE TO INTERROGATORY NO. 6:**

22 Plaintiff never sent in any written objections.

23 **INTERROGATORY NO. 7:**

24 If YOU received billing statements for the credit card account bearing  
25 account no. 4018040019787686, IDENTIFY all instances in which YOU objected  
26 orally to the ORIGINAL CREDITOR RELATING to the balance shown on the  
billing statement.

27 **RESPONSE TO INTERROGATORY NO. 7:**

28 Plaintiff called Original Creditor once, but cannot speak to the specific

1 details of that telephone call or if it was in relation to account no.  
2 4018040019787686.

3 **INTERROGATORY NO. 8:**

4 IDENTIFY all FINANCIAL ACCOUNTS YOU maintained from January 1,  
5 2002 to the present.

6 "FINANCIAL ACCOUNTS" means any banking, checking, savings, credit  
7 union account, or any other account in which YOU maintained funds, or in which  
8 funds were maintained on YOUR behalf, or other account containing funds to  
9 which YOU had access, but excluding retirement accounts.

10 **RESPONSE TO INTERROGATORY NO. 8:**

11 Objection. Plaintiff's financial accounts are not reasonably calculated to lead  
12 to discoverable information and invades Plaintiff's privacy. Plaintiff will not be  
13 providing this information.

14 **INTERROGATORY NO. 9:**

15 IDENTIFY all FINANCIAL ACCOUNTS from which YOU made any  
16 payment toward any balance due for the credit card account bearing the account no.  
17 4018040019787686.

18 **RESPONSE TO INTERROGATORY NO. 9:**

19 Objection. Plaintiff's financial accounts are not reasonably calculated to lead  
20 to discoverable information and invades Plaintiff's privacy. Plaintiff will not be  
21 providing this information.

22 **INTERROGATORY NO. 10:**

23 State why YOU failed to pay the balance due in full for the credit card  
24 account bearing the account no. 4018040019787686.

25 **RESPONSE TO INTERROGATORY NO. 10:**

26 Plaintiff does not recall the exact account numbers of the credit cards he has  
27 had and cannot state whether he paid the full balance. If he did pay the full balance  
28 he can not state why he did not pay the full balance. Discovery and investigation  
are continuing. Plaintiff reserves the right to supplement this response.

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HYDE & SWIGART  
San Diego, California

Dated: November 15, 2012

Hyde & Swigart

By: 

Joshua B. Swigart  
Attorneys for Plaintiff

**Charlie Hauswirth**  
v.  
**Midland Funding, LLC, Legal Recovery  
Law Offices, Inc., and Mark D. Walsh**

**Court Name:** UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF CALIFORNIA

**Case No.:** 12-CV-0711-DMS-DHB

**VERIFICATION**

I am the Plaintiff in the above-captioned matter. I am familiar with the contents of the foregoing:

- **PLAINTIFF CHARLIE HAUSWIRTH'S RESPONSES TO  
DEFENDANT MIDLAND FUNDING, LLC'S  
INTERROGATORIES, SET ONE**

The information supplied therein is based on my own personal knowledge and/or has been supplied by my attorneys or other agents and is therefore provided as required by law. The information contained in the foregoing document is true, except as to the matters, which were provided by my attorneys or other agents, and as to those matters, I am informed and believe that they are true.

I declare, under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 10-13-12, at San Diego, CA.  
(Date) (City, State)

Charlie Hauswirth  
**Charlie Hauswirth**

1 *Hauswirth v. Midland Funding, LLC, Legal Recovery Law Offices, Inc. & Mark D. Walsh*  
2 *United States District Court for the Southern District of California*  
3 *12-CV-00711-DMS-DHB*

4 PROOF OF SERVICE

5 I, Brittney Miller, declare as follows:

6 I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego, California,  
7 where the mailing occurs. My business address is 411 Camino del Rio South, Suite 301, San Diego, CA, 92108. I am  
8 readily familiar with our business' practice of collecting, processing, and mailing of correspondence and pleadings for  
9 mail with the United States Postal Service.

10 On November 15, 2012, I served the foregoing document(s) described as:

11 Plaintiff's Responses to Defendant Midland Funding, LLC's Requests for Admissions, Set One  
12 Plaintiff's Responses to Defendant Midland Funding, LLC's Requests for Production of Documents, Set One  
13 Plaintiff's Responses to Defendant Midland Funding, LLC's Interrogatories, Set One  
14 Verification of Plaintiff's Responses to Defendant Midland Funding, LLC's Requests for Admissions, Set One  
15 Verification of Plaintiff's Responses to Defendant Midland Funding, LLC's Requests for Production of  
16 Documents, Set One  
17 Verification of Plaintiff's Responses to Defendant Midland Funding, LLC's Interrogatories, Set One

18 On the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope as follows:

19 

<u>Midland Funding, LLC</u>	<u>Legal Recovery Law Offices, Inc. &amp; Mark D. Walsh</u>
Thomas F. Landers	
Leah S. Strickland	David Cotter
Solomon Ward Seidenwurm & Smith, LLP	Legal Recovery Law Offices, Inc.
401 B. Street, Suite 1200	5030 Camino De La Siesta # 340
San Diego CA 92101	San Diego CA 92108

20 [X] BY OVERNIGHT MAIL, by placing a copy thereof in a separate envelope for each addressee named above,  
21 addressed to each addressee respectively, and then sealed each envelope and, with the postage fully prepaid,  
22 deposited each in the Overnight delivery receptacle mail at Riverside, California in accordance with our  
23 business' practice.

24 I declare under penalty under perjury under the laws of the State of California that the foregoing is true and correct.  
25 Executed on November 15, 2012, at San Diego, California.

26   
27 Brittney Miller  
28

# **EXHIBIT 3**

01/17/08 \$4628.20 \$4628.20 SITE:KC-CL TM:CO-5000 ACID:ROB1242  
 04/05/12 11:57:20  
 PM/2008/04/05 04/05/12 11:57:20

CHARLIE B HAUSWIRTH  
 7967 GOLDEN AVE  
 LEMON GROVE  
 91945-1811000

CITI CARDS  
 PROCESSING CENTER  
 DES MOINES, IA  
 50363-0001

CA

## Citi<sup>®</sup> Platinum Select<sup>®</sup> Card



Account Number  
 4018 0400 1978 7686

**Customer Service:**

1-800-382-3334	Total Credit Line	Available Credit Line	Cash Advance Limit	Available Cash Limit	New Balance
PO BOX 142319 IRVING, TX 75014-2319	\$3880	\$0	\$2800	\$0	\$4628.20

  

Sale Date	Post Date	Reference Number	Activity Since Last Statement	Amount
12/24			Standard Purch PURCHASES*FINANCE CHARGE*PERIODIC RATE 84 0000 0	37.71 70000000000
12/24			Purch/Adv Thru 12/23/2005 PURCHASES*FINANCE CHARGE*PERIODIC RATE 84 0000 0	83.42 70000000000

Help is available! Please call the toll-free number shown above to learn about our special payment options. Call Monday - Friday, 7 am to 9 pm, or Saturday, 8 am to 5 pm, Central Time. Please give us the opportunity to assist you.

Account Summary	Previous Balance	(+) Purchases & Advances	(-) Payments & Credits	(+) FINANCE CHARGE	(=) New Balance
PURCHASES	\$4,507.07	\$0.00	\$0.00	\$121.13	\$4,628.20
ADVANCES	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
<b>TOTAL</b>	<b>\$4,507.07</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>\$121.13</b>	<b>\$4,628.20</b>

Rate Summary	Balance Subject to Finance Charge	Periodic Rate	Nominal APR	ANNUAL PERCENTAGE RATE
PURCHASES				
Standard Purch	\$1,421.21	0.00559%(D)	31.240%	31.240%
Purch/Adv Thru 12/23/2005	\$3,144.20	0.08559%(D)	31.240%	31.240%
ADVANCES				
Standard Adv	\$0.00	0.08559%(D)	31.240%	31.240%

MF-HAU000014

# **EXHIBIT 4**

**HYDE & SWIGART**  
Attorneys at Law

<b>SAN DIEGO, CA</b>	411 Camino Del Rio South, Suite 301 San Diego, CA 92108
<b>SAN FRANCISCO, CA</b>	
<b>RIVERSIDE, CA</b>	T (619) 233-7770
<b>ORANGE, CA</b>	F (619) 297-1022
<b>PHOENIX, AZ</b>	<a href="http://www.westcoastlitigation.com">www.westcoastlitigation.com</a>
<b>Attorney Bar Licenses:</b> Robert L. Hyde (CA & MN) Joshua B. Swigart (CA & DC) David J. McGlothlin (AZ & CA) Andrea Darrow Smith (CA) Desiree D. Nguyen (CA)	

January 31, 2013

Thomas F. Landers  
Leah S. Strickland  
**SOLOMON WARD**  
401 B. Street, Suite 1200  
San Diego CA 92101  
[tlanders@swsslaw.com](mailto:tlanders@swsslaw.com)  
[lstrickland@swsslaw.com](mailto:lstrickland@swsslaw.com)

*RE: Your Previous Correspondence Concerning the Acosta v. Midland Funding, LLC, Legal Recovery Law Office, Inc, and Mark Walsh and other Related Cases*

Dear Counsel:

This is a letter to summarize what changes if any will be made by our clients discovery responses regarding issues you raised in your meet and confer letter and our meeting following. My understanding from our meeting is that you request supplemental responses from the following plaintiffs; Maria Real, Charlie Hauswirth, Bradley Vogt, and Suzan Tapp. We have conferred with all four of the above listed Plaintiffs and below is what additional information we can provide. spoke with them and reviewed the documentation in detail.

**Plaintiff Maria Real**

Ms. Real does not recognize any of the document provided by Midland and/or the alleged original creditor HSBC. She cannot state with any certainty that the alleged account is her account. Ms. Real would testify in a deposition that she does not recall opening a HSBC account. It is difficult to go into any detail with her concerning the alleged account, as your client has not provided any statements with transaction detail. As Ms. Real does not recall this account and HSBC has submitted a declaration that no account existed, there is nothing to supplement. If you desire to take Ms. Real's deposition, please advise. The creditor documentation including that from HSBC

**Plaintiff Charlie Hauswirth**

Mr. Hauswirth has further reviewed the documents supplied by your client. After a further review he recalls at one time having an account with Chase. He does not recall the agreement attached as being his. He does not have a specific recollection of making payments in the amount listed, but had a prior history of making minimum monthly payments on similar accounts. Further, he would make any payments on his accounts, Chase included, with a money order, so any banking records would not evidence payment on the account. Please advise if you would like Mr. Hauswirth to supplement any responses and/or have his deposition taken.

**Plaintiff Bradley Vogt**

Mr. Vogt further reviewed the documents provided by your office. He has no recollection of the account and believes that the account may have been opened by someone else using his identify and does not recognize any of

the listed charges. Mr. Vogt would testify that he had no knowledge of the account until he was sued by your client. The address present on the statement is not his mailing address, but an address used for his employer's headquarters. He has never received statements on this alleged account or other mail at this address. Additionally, any mail received at this address was never forwarded to him. Mr. Vogt reviewed the signature on the application card and believes someone forged his signature. If you want Mr. Vogt to supplement these responses and/or take his deposition, please let me know.

Plaintiff Tapp

Ms. Tapp is currently in Turkey and our office has been unable to reach her for a further phone interview concerning the issues you raised. We are in the process of setting a time to discuss this matter, but as of the date of this letter, we have nothing to supplement for Ms. Tapp.

As we discussed, I am open to having any or all of my client's sit for a deposition. We would request that a 30(b)(6) witness be identified and scheduled from your side to correspond with each Plaintiff's deposition. I believe we have previously noticed depositions, but had postponed them due to a further agreement. Please let me know with regard to this issue.

Sincerely,

/s/Joshua B. Swigart